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September 28, 2010

E-File

**Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001**

227881

**Re: STB Finance Docket No. 35412, Middletown & New Jersey
Railroad, LLC – Lease and Operation Exemption – Norfolk
Southern Railway Company**

Dear Ms. Brown:

**Attached for e-filing is the Reply of Middletown & New Jersey Railroad,
LLC to the Petition For Stay filed by United Transportation Union-New York State.**

If you have any questions, please contact me.

Sincerely yours,



Karl Morell

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35412

**MIDDLETOWN & NEW JERSEY RAILROAD, LLC
--LEASE AND OPERATION EXEMPTION--
NORFOLK SOUTHERN RAILWAY COMPANY**

**REPLY TO UNITED TRANSPORTATION UNION-NEW YORK STATE'S
PETITION FOR STAY**

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Dated: September 28, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35412

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REPLY TO UNITED TRANSPORTATION UNION-NEW YORK STATE'S
PETITION FOR STAY

Middletown & New Jersey Railroad, LLC ("M&NJ"), hereby replies in opposition to the Petition for Stay filed by Samuel J. Nasca, for and on behalf of United Transportation Union-New York State ("UTU") on September 23, 2010 ("Petition").

BACKGROUND

On August 31, 2010, M&NJ¹ filed its Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart E—Exempt Transactions Under 49 U.S.C. 10902, to permit M&NJ to lease and operate certain rail lines from Norfolk Southern Railway Company ("NS"); sublease

¹ M&NJ is not the same company with a similar name listed in past issues of The Official Railway Guide, as UTU alleges. UTU correctly points out that M&NJ is headquartered in Kennett Square, PA, which is also the headquarters of its affiliated company, East Penn Railway, LLC ("ESPN"). Kennett Square is the corporate headquarters where administrative functions are performed. M&NJ also has a local office at 140 East Main Street, Middletown, NY which is less than 12 miles from the Leased Lines. NS, on the other hand, is headquartered in Norfolk, VA, and manages its train crews on the Leased Lines out of Jersey City, NJ. Thus, M&NJ will be a much more locally based carrier than NS.

connecting track owned by New York, Susquehanna & Western Railway ("NYS&W") (the "Leased Lines"), and receive incidental overhead trackage rights ("Notice of Exemption").²

REPLY

The standards governing disposition of a request for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("Petroleum Jobbers"). It is the movant's obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and the movant carries the burden of persuasion on each of the four elements required for the extraordinary relief. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

As is demonstrated below, UTU has failed to meet the stay criteria.

UTU Is Unlikely To Prevail On The Merits

UTU has not demonstrated, and cannot demonstrate, that M&NJ's Notice of Exemption fails to comply with the Board's applicable regulations or that the proposed transaction does not qualify for the class exemption.

² M&NJ objects to UTU's attempt to incorporate in the Petition, its planned petition to revoke which UTU expects to file on September 27, 2010. UTU's stay request was due on September 23, 2010. Thus, anything filed thereafter in support of the stay request would be late-filed. Also, bootstrapping its petition to revoke onto the stay request would deprive M&NJ of any meaningful response before the Board issues its decision on the stay request.

UTU first claims that the interchange agreement³ between M&NJ and NS contains anticompetitive features which may have bearing on certain aspects of the National Transportation Policy ("NTP") such as 49 U.S.C. § 10101(11), fair wages and safe and suitable working conditions; 49 U.S.C. § 10101(9) honest and efficient management; and 49 U.S.C. § 10101(8) operate transportation facilities and equipment without detriment to public health and safety. UTU fails to explain how an interchange commitment, particularly the interchange commitment contained in the Lease Agreement, could possibly implicate the sections of the NTP relied on by UTU. Moreover, the Board's rules expressly provide for the filing of transactions involving an interchange commitment under 49 C.F.R Part 1150, Subpart E – Exempt Transactions Under 49 U.S.C. 10902. It would be fundamentally unfair to change those rules, or the application of those rules, in the context of this proceeding.

The Board's rules contemplate the challenging of an interchange commitment by "a shipper or other affected party". Section 1150.43(h)(2). Consequently, if any shipper or other affected party on the leased lines wishes to challenge the interchange commitment contained in the Lease Agreement it may do so. UTU is not a shipper and it is unlikely that UTU would qualify as an "affected party". UTU has failed to demonstrate how its interests will be adversely affected by the interchange commitment. Rather, it appears that UTU is simply using the Board's rules governing interchange commitments for other objectives.

The provision contained in the Lease Agreement arguably falls within the technical definition of "interchange commitment" set forth at Section 1150.43(h)(1), but it is neither a total ban on interchanging with another rail carrier nor does it provide for a penalty payment if such third party interchange occurs. The lease transaction proposed by NS did not contain an

³ It is the lease agreement between M&NJ and NS ("Lease Agreement") that contains the interchange commitment and not the interchange agreement.

interchange commitment. M&NJ requested the per car credits set forth in the Lease Agreement so that M&NJ could earn sufficient income from operations over the Leased Lines not only to cover operating and routine maintenance costs, but also sufficient income to upgrade the Leased Lines. The Lease Agreement, without the interchange commitment, is adequate to maintain the status quo. In order to attract new customers to the Leased Lines, however, the Leased Lines need to be upgraded.

The only rail connection M&NJ will have, other than NS, is the New York, Susquehanna & Western Railway ("NYS&W"). The interchange commitment in the Lease Agreement does not preclude M&NJ from interchanging with NYS&W nor is M&NJ penalized if it does so. To the extent a routing via the NYS&W is economically more beneficial to M&NJ or is reasonably requested by a shipper on the Leased Lines, M&NJ will route the traffic via NYS&W and not NS.

UTU next argues that the scope of the transaction goes far beyond the scope of transactions under the class exemption. The involved transaction involves the lease and sublease of approximately 36.15 miles of rail line and trackage rights over approximately 4.36 miles of rail line. The Board and its predecessor have permitted the use of the class exemption for transactions vastly broader in scope. *See e.g.,* STB Finance Docket No. 34508, *Central Railroad of Indianapolis -- Lease and Operation Exemption -- CSX Transportation, Inc.* (not printed), served July 30, 2004 (lease of 273 miles of rail line); STB Finance Docket No. 35073, *Northwestern Pacific Railroad Company -- Change in Operators -- North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC* (not printed), served August 24, 2007 ("*Northwestern Pacific*") (change in operator on approximately 142 miles of rail line).

UTU also claims that the transaction is somehow unusual because it involves multiple agreements. Virtually all shortline lease and sale transactions, particularly those involving a Class I railroad, necessarily involve multiple agreements. Thus, the structure of the NS-M&NJ transaction is not unique but largely standard practice. Moreover, contrary to UTU's suggestion, the class exemption is not limited to three carriers. *See e.g., Northwestern Pacific* (transaction involved multiple parties). In any event, the involved transaction involves only three carriers: NS, M&NJ and NYS&W. Metro North Commuter Railroad Company ("Metro") is not a party to this transaction. As part of this transaction, M&NJ is being granted incidental trackage rights over 4.36 miles of track that NS subleases to Metro, which Metro uses to conduct rail operations..

UTU's safety concerns regarding M&NJ's operations over rail lines shared by Metro are totally misplaced. M&NJ's use of these rail lines will be limited to time windows determined by Metro in the same manner that Metro currently determines such time windows for NS's use. Metro is fully aware of the involved transaction and has not raised any safety concerns with the Board, NS or M&NJ. Moreover, all of the employees of M&NJ recently successfully passed the Northeast Operating Rules Advisory Committee ("NORAC") testing and the NORAC Rules and NS Rules Tests administered by an official from NS and attended by a trainmaster from Metro.

Contrary to UTU's contention, the principals of M&NJ are not unknown but have extensive experience in the railroad industry and have managed shortlines that operated over rail lines with freight and passenger operations. Robert Parker and Alfred Sauer, the co-founders of Regional Rail, LLC ("Regional Rail"), have long and successful careers in the railroad industry. Both joined RailAmerica, Inc. ("RailAmerica") in 1995 from different railroads and subsequently led the acquisition team that was successful in increasing the number of railroads in

the RailAmerica family from 4 to 54.⁴ In 2003, Messrs. Parker and Sauer joined OmniTRAX, Inc. ("OmniTRAX") and in the following 4 years doubled the size of OmniTRAX's shortline railroad portfolio. In 2007, Messrs. Parker and Sauer left OmniTRAX to found Regional Rail, the parent of ESPN and M&NJ.

ESPN currently operates over a NS line into Reading that has much more traffic than the Leased Lines. ESPN has conducted these operations without incident. Some of the other shortlines managed by Mr. Parker and/or Mr. Sauer which also had passenger operations include Connecticut Southern Railroad ("CSR") (Amtrak)⁵, New England Central Railroad (Amtrak), Goderich-Exeter Railway (VIA Rail), Cape Breton & Central Nova Scotia Railway (VIA Rail), Hudson Bay Railway (VIA Rail), San Diego & Imperial Valley Railroad (commuter), and Dallas, Garland & Northeastern Railroad (commuter). Not only did these shortlines safely co-exist with the passenger/commuter operations, but in some cases the shortline supplied the crews for the passenger train. Contrary to UTU's contention, Messrs. Parker and Sauer have extensive experience managing shortlines, including ones that co-exist with passenger operations.

Denial Of The Stay Will Not Cause UTU Irreparable Harm

An administrative decision is not ordinarily stayed without an appropriate showing of irreparable harm. *Permian Basin Area Rate Case*, 390 U.S. 747, 777 (1968). Indeed, a stay is an extraordinary remedy that should not be sought unless the moving party faces unredressable actual and imminent harm that would be prevented by a stay. See STB Finance Docket No. 34824, *Tri-State Brick & Stone of N.Y., Inc. – Pet. For Declaratory Order* (not printed), served

⁴ Mr. Parker's last position at RailAmerica was Senior Vice President Operations – Eastern Corridor, with responsibilities for 35 shortline railroads. Mr. Sauer's last position at RailAmerica was Senior Vice President Marketing – Chief Commercial Officer, with responsibilities for all marketing and sales activities for 54 shortline railroads in the United States and Canada.

⁵ Indeed, CSR operates extensively over Amtrak owned Northeast Corridor rail lines.

February 12, 2008. UTU has failed to demonstrate that anyone will suffer irreparable harm in the absence of a stay.

UTU claims, but submits no supporting evidence, that 15 NS employees will be displaced as a result of this proposed transaction. According to NS, as a result of the transaction, one signal maintainer, one engineer and one conductor position on NS at Campbell Hall will be eliminated. The individual employees currently holding those three positions have seniority that affords them work opportunities near Campbell Hall such that NS does not anticipate furloughing any such employees. In any event, the UTU allegation, even if accurate, does not rise to the level of sustaining a finding of irreparable harm. See STB Finance Docket No. 34145, *Bulkmatic Railroad Corporation – Acquisition Exemption – Bulkmatic Transport Company* (not printed), served December 27, 2001. The showing of “mere injuries, however substantial, in terms of money...expended in the absence of a stay” do not constitute irreparable injury because adequate compensatory relief can be had at a later date. *Petroleum Jobbers* at 925. Neither the Board nor the courts have found economic injuries of this nature to be irreparable because they are compensable through reparations. See Finance Docket No. 30965 (Sub-No. 1), *Delaware and Hudson Railway Co. – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company* (not printed), served July 15, 1988. Indeed, the claimed loss of 72 employees was deemed inadequate by the Board to support a showing of irreparable harm. See STB Finance Docket No. 33326, *I&M Rail Link, LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company D/B/A Canadian Pacific Railway* (not printed), served April 4, 1997.

A Stay Would Harm Shippers And M&NJ

M&NJ intends to upgrade the tracks and, as a short line operator, improve service to the shippers located on the Leased Lines. Thus, delaying the implementation of the involved transaction will have a material, adverse effect on the shippers located on the Leased Lines by delaying the benefits they will realize once M&NJ commences operations. Any delay in M&NJ's operations will cause M&NJ to incur significant expenses, resulting in a loss of business that will be unrecoverable and cause uncertainty among its employees and the shippers located on the Leased Lines. Indeed, M&NJ has hired and trained four new employees and acquired equipment, including locomotives, a hi-rail vehicle and other materials needed for the operation of the Leased Lines.

M&NJ plans to rehabilitate the track once it leases the lines from NS. M&NJ's planned rehabilitation program will create new jobs and infuse money into the ailing local economy. Also, it appears that M&NJ will be hiring more employees than are currently working on the Leased Lines. Consequently, M&NJ's lease of the lines will not only improve service to the shippers on the Leased Lines but will also infuse capital into the local economy and increase jobs at this critical time.

A Stay Is Not In The Public Interest

UTU has failed to demonstrate how issuance of a stay would further the public interest. M&NJ's proposed change in operations is intended to increase the efficiency of rail operations in the area, improve service to the shippers and increase jobs on the Leased Lines. For more than two decades, the Board and its predecessor have consistently stated that the public interest is served by encouraging the formation of shortline and regional rail carriers. Consequently, granting the stay is contrary to the public interest.

CONCLUSION

M&NJ respectfully urges the Board to deny UTU's Petition. The Petition falls woefully short of meeting the criteria for a stay.

Respectfully submitted,



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Dated: September 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2010, I have caused a copy of the foregoing Reply to be served on all parties of record.

A handwritten signature in black ink, appearing to read "Karl Morell", is written over a horizontal line.

Karl Morell